United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig. w/ affidavit of mailing

76-6163

To be argued by
MICHAEL G. CAVANAGH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6163

GREGORY ROMAN-SANTIAGO,
Plaintiff-Appellant,

—*against*—

DAVID MATTHEWS, Secretary of Health,
Education and Welfare,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
MICHAEL G. CAVANAGH,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Plaintiff-Appellant Gregory Roman-Santiago appeals from an order of the United States District Court for the Eastern District of New York (Dooling, J.) entered October 6, 1976 denying him Social Security disability benefits.

Appellant brought the action below in the district court pursuant to section 205(g) of the Social Security Act, as amended, (hereinafter referred to as the Act), 42 U.S.C. § 405(g), to review a final determination of the Secretary of Health, Education, and Welfare, which denied plaintiff's application for a period of disability and disability insurance benefits. The district court granted the Secretary's motion for a judgment on the pleadings after hav-

ing found that there was substantial evidence to support the administrative determination denying disability benefits to plaintiff and that plaintiff had had a full and fair administrative hearing.

Appellant filed an application for a period of disability and for disability insurance benefits on January 10, 1973 (Tr. 68-71),[1] alleging that he became unable to work on March 10, 1971, at age 38. The application was denied initially (Tr. 72-3) and was likewise denied on reconsideration by the Bureau of Disability Insurance of the Social Security Administration (Tr. 77). The Administrative Law Judge, before whom plaintiff, an interpreter and Mr. Arther Bierman, a vocational expert and licensed psychologist, appeared, considered the case *de novo*, and on May 14, 1975, found that plaintiff was not under a disability (Tr. 5-12, 113). The Administrative Law Judge's decision became the final decision of the Secretary of Health, Education, and Welfare, when the Appeals Council approved the decision on October 23, 1975 (Tr. 3).

On this appeal appellant contends that the Secretary's decision is not supported by substantial evidence. In addition he contends that the administrative determination was improper because of shortcomings on the part of the administrative law judge in the way he conducted the hearing and developed the evidence. Plaintiff also alleges that he was prejudiced by his lack of counsel during the administrative hearing. The government's position is that there is substantial evidence in support of the Secretary's decision and that appellant received a full and fair hearing.

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[1] The references in parentheses are to pages in the administrative transcript which is contained in the Appendix.

Statement of Facts

The gravamen of appellant's claim for Social Security disability benefits is back pain which he claims renders him incapable of working since he was injured on March 10, 1971 (Tr. 68-71).

Medical Evidence of Record:

1) The September 18, 1973 report of Dr. S. Honig states that X-rays of appellant's back reveal "mild spurring of L3 and 4,[2] but no evidence of fracture or dislocation . . . ." (Tr. 126).

2) A consulting specialist in orthopedics, Dr. Irwin Nelson, examined appellant on May 2, 1974. In his report Dr. Nelson noted that "there is no scoliasis, deformity, spasm or tenderness of the lumbrosacral spine" and that "X-Rays of the lumbrosacral spine are negative for fracture or dislocation". Early osteoarthritis was noted. Dr. Nelson's conclusion was that despite the severity of appellant's complaints "there are no objective findings" and that plaintiff can sit, stand, stoop and lift up to 35 pounds . . . ." (Tr. 118-119, 122)

3) Dr. Paul Post, appellant's treating orthopedist, diagnosed appellant as having a lumbrosacral derangement, resulting in pain, backache, and restriction of motion. Dr. Post concluded that appellant could do light work not involving bending or lifting. (Tr. 115, 120).

4) A portion of appellant's Workmen's Compensation record, included in the administrative transcript, contains four medical reports, two additional reports from Dr.

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[2] "L 3 and 4" are vertebrae of the lower spine.

Post and two from Dr. Charles Simon, a consulting physician to the New York State Workmen's Compensation Board (Tr. 108-113). Dr. Post's reports basically reiterate his earlier conclusions, set forth above. Dr. Simon's reports indicate that there is tenderness in appellant's lumbar area with muscle spasm and a certain degree of restriction in motion. The Laseque signs, a test for detecting a ruptured disc,[3] failed to disclose such an injury. Both doctors felt that appellant was under a partial disability.

5) Dr. Raymond Goldstein, a chiropractor, examined appellant on two occasions (Tr. 50, 116-117). After a review by him of the reports from the Workmen's Compensation Board file, Dr. Goldstein concluded that appellant had a "marked disability", but the doctor apparently made no independent diagnosis of appellant condition.

6) Records from Kings County Hospital describe appellant as having mild anterior spurring of L3 and L4. (Tr. 123-126).

Non-Medical Evidence of Record:

1) Appellant is a 43 year old male with a sixth grade education, who, prior to the onset or his alleged disability on March 10, 1971, had worked as a cutter in the garment industry (Tr. 31, 33, 35). In addition to the aforementioned job, appellant had worked at various times as a farm laborer and soldering machine operator (Tr. 45-48).

2) Appellant testified at the hearing as to his subjective complaint of periodic pain (Tr. 34, 54-55, 63).

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[3] See *Lesions of the Lumbar Intervertebral Disc*, R. Glen Spurling; and *Lawyer's Medical Cyclopedia* § 7.11.

He disputed Dr. Nelson's finding that he could walk four blocks and lift 35 pounds, but admitted he could carry 10 pounds, walk two or three blocks with pauses between blocks, stand or sit for one hour, and climb a flight of stairs (Tr. 37, 50-57).

3) A vocational expert, Mr. Arther Bierman, also testified at the hearing. He was asked by the Administrative Law Judge whether, if all of the plaintiff's testimony dealing with his residual capacity were to be believed, could plaintiff do any jobs in the national economy that exist in significant numbers. Mr. Bierman gave a positive response and stated that plaintiff could do some light sedentary work such as examiner, hand packer, inspector or assembler and that thousands of such jobs existed in the New York metropolitan area (Tr. 50-53, 60-63).

ARGUMENT

The Secretary's Determination That Appellant Was Not Entitled To Disability Benefits Is Supported By Substantial Evidence In The Record And Should Be Affirmed.

In order to establish entitlement to a period of disability insurance benefits, a claimant has the burden of establishing that he is unable to engage in substantial gainful activity by reason of a physical or mental impairment, which (1) can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months and (2) the existence of which is demonstrated by evidence supported by objective data obtained by medically acceptable clinical and laboratory techniques, at a time when he met the insured status requirements of the Social Security Act. 42 U.S.C.

§ 423(d); *Reyes-Robles* v. *Finch*, 409 F.2d 84 (1st Cir. 1969); *Henley* v. *Celebrezze*, 394 F.2d 507 (3d Cir. 1969); *Franklin* v. *Secretary of Health, Education and Welfare*, 393 F.2d 640 (2d Cir. 1968). A finding by the Secretary, if supported by substantial evidence, that a claimant is not entitled to disability benefits is conclusive and cannot be disturbed by a court reviewing the Secretary's determination under 42 U.S.C. § 405(g). *Richardson* v. *Perales*, 402 U.S. 389 (1971).

For a claimant to be disabled within the meaning of the Social Security Act it is insufficient merely to show an impairment. The impairment must be of such severity as to preclude the plaintiff from engaging in any substantial gainful activity. Factors to be taken into account in determining whether an impairment constitutes a disability within the meaning of the Social Security Act are (1) medical data and findings; (2) expert medical opinion; (3) subjective complaints; and (4) the plaintiff's age, educational background and work history. *Gold* v. *Secretary of Health, Education and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972).

There are substantial medical facts and opinions in the administrative transcript to support the Secretary's denial of appellant's claim. It is conceded that appellant has been diagnosed by the various physicians who examined him as having a certain amount of back pain, tenderness, motion restriction and muscle spasm resulting from either lumbrosacral derangement, early osteoarthritis, or a mild anterior spurring of two vertebrae. However, it should be noted that none of the doctors who examined appellant, with the exception of appellant's chiropractor, Dr. Goldstein, was of the opinion that plaintiff had a total disability due to his condition.

Dr. Nelson stated appellant could "sit, stand, stoop and lift up to 35 pounds" and "has both fine and gross manipulation of the hands" (Tr. 119). The reports of Drs. Post and Simon submitted to the Workmen's Compensation Board concluded that appellant suffers only from a partial disability (Tr. 110-113). The report of Dr. Post, appellant's treating orthopedist, submitted to the New York State Department of Social Service, specifically found that appellant could work, provided his employment did not involve bending or lifting. This report of Dr. Post should be considered in light of the rule that "expert opinions of plaintiff's treating physicians as to plaintiff's disability . . . are binding . . . if not controverted by substantial evidence to the contrary." *Gold* v. *Secretary, supra.* Likewise, a treating specialist's finding that a plaintiff can work must carry great weight with the Secretary.

The one medical report that is at odds with the Secretary's determination is that of the chiropractor, Dr. Goldstein, who plaintiff saw twice. Dr. Goldstein's finding of "marked disability", does not, however, require the Secretary to grant benefits, since Dr. Goldstein's opinion is controverted by the substantial evidence in the reports of Drs. Nelson, Simon and Post.

The Secretary recognizes plaintiff's allegations of pain and further recognizes that pain in some circumstances, if supported by objective medical evidence, can be disability under the Social Security Act. However, the Secretry is not bound to give credence to plaintiff's testimony as to the existence, severity, or debilitating effects of the pain. *Reyes-Robles* v. *Finch, supra,* 409 F.2d at 84; *Labee* v. *Cohen,* 408 F.2d 998 (5th Cir. 1969); *Peterson* v. *Gardner,* 391 F. 208 (2d Cir. 1968); *LaBoy* v. *Richardson,* 355 F. Supp. 602 (D.P.R. 1972); *Mounts*

v. *Finch*, 304 F. Supp. 910, 917 (S.D.W. Va. 1969); *Brady* v. *Gardner*, 294 F. Supp. 870 (W.D. Va. 1968). Indeed, as was succinctly set forth by the First Circuit in the *Reyes-Robles* case:

> "... if a claimant could, as a matter of law, overcome the effect of what would otherwise be substantial evidence of continued ability to work by his own testimony as to his condition, the Secretary would rarely if ever be justified in denying benefits." 490 F.2d 84, 87.

In view of the medical opinion of Dr. Nelson that plaintiff's allegations of pain are not supported by objective findings and that he can sit, stand, stoop and lift up to 35 pounds, and in view of Dr. Post's conclusion that plaintiff can work, it is entirely reasonable for the Secretary to have rejected subjective complaints and non-medical evidence to the contrary presented to him.

In addition to the objective and subjective medical evidence of record, the Secretary also considered the testimony of a vocational expert, Mr. Bierman. He testified to the effect that, even if plaintiff's testimony as to his residual functional capacity were true, plaintiff could do certain light and sedentary jobs that exist in the national economy, such as examiner, hand packer inspector, assembler. He added that thousands of such jobs exist in the New York Metropolitan area (Tr. 50-53, 60-63).

Despite the substantial evidence in support of the Secretary's denial of disability benefits, appellant still alleges the Secretary's decision is defective. Appellant apparently contends, in arguments only partially presented to the district court, that the administrative law judge was somehow remiss in not fully developing appel-

lant's case and that appellant was substantially prejudiced by his lack of counsel at the administrative hearing. We respectfully submit that both claims are wholly without merit. The transcript of the administrative hearing does not support these contentions and the district court properly found that appellant received a full and fair hearing.[4] (Supplementary Appendix).

The Honorable John F. Dooling in his district court opinion recited how appellant was given time to find a lawyer, provided with an interpreter and was told that further medical evidence could be submitted to show appellant's entitlement to disability benefits. Judge Dooling commented favorably on the administrative law judge's examination of the vocational expert and concluded that the administrative law judge acted effectively and fairly. The record reveals that appellant reviewed the documentary evidence twice before the hearing, once with the interpreter, and that the administrative law judge was most receptive to any offers of proof appellant wanted to make. (Supplementary Appendix) (Tr. 15-16, 38).

In sum, the record reveals no substance to appellant's contentions that he was not accorded a full and fair hearing, was prejudiced by lack of counsel, and that the Secretary's decision was based on insubstantial evidence.

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[4] It should be noted that appellant, even after he was represented by counsel in the district court and had the full discovery rights provided by the Federal Rules of Civil Procedure, has never come forward with any additional medical evidence, either of a physiological or psychiatric nature, evidence which he now alleges was improperly not subpoened or developed by the administrative law judge. In addition appellant has failed to produce any further testimony which would support his claim for disability benefits.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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EASTERN DISTRICT OF NEW YORK

Joanne Bracco being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of January 19 77 he served a copy of the within

Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed to:

John C. Gray, Jr. & Gretchen L. Sprague
Brooklyn Legal Service Corp. "B"
~~152 Court Street~~
Brooklyn, N.Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this
17th day of January 1977

Carolyn M. Johnson

CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-[illegible]
Qualified in Queens County
Term Expires March 30, 1979